

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

FEB 23 2007

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2006-0330-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
PAUL GREGORY WHITE,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
_____)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20044262

Honorable Kenneth Lee, Judge

REVIEW GRANTED; RELIEF DENIED

DiCampli & Elsberry, L.L.C.
By Anne Elsberry

Tucson
Attorneys for Petitioner

PELANDER, Chief Judge.

¶1 For driving under the influence of alcohol with his three minor children in the vehicle, petitioner Paul Gregory White was indicted on eight felony charges: aggravated driving under the influence (DUI) of an intoxicant and aggravated driving with an alcohol concentration of .08 or more, both with a suspended, revoked, or restricted license; three

counts of child abuse; and three counts of aggravated DUI with a minor present. The state alleged he had one prior DUI conviction and two prior aggravated DUI convictions.

¶2 Pursuant to a plea agreement, White pled guilty to amended charges of endangerment, a class six felony, and misdemeanor DUI. The trial court suspended imposition of sentence and placed White on concurrent terms of probation, the longer for five years. White then filed a notice of and petition for post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., 17 A.R.S. The present petition for review follows the trial court's dismissal of White's petition without a hearing, a ruling we review only for an abuse of discretion. *State v. Watton*, 164 Ariz. 323, 325, 793 P.2d 80, 82 (1990).

¶3 In his petition below, White raised the same issues and presented the same arguments that appear in the petition for review. He asserted that his plea was not voluntary because trial counsel had advised him incorrectly about the sentences he faced if convicted at trial, that the charges in the indictment violated the prohibition against double jeopardy and wrongly induced his guilty plea, and that trial counsel was ineffective in several ways. The trial court analyzed White's claims in some depth and explained its reasons for denying relief in a five-page minute entry.

¶4 First, the trial court ruled the charges against White did not violate double jeopardy because the elements of the offenses charged were different.¹ White contended that

¹Because jeopardy typically does not attach until a jury is impaneled, *State v. Soloman*, 125 Ariz. 18, 21, 607 P.2d 1, 4 (1980), and because White pled guilty to other, lesser charges in any event, normally we would not address his double jeopardy claim.

the offense of DUI with a minor present “required proof of the same elements required to prove the underlying DUI” and that proving child abuse required proving the same elements as DUI with a minor present. But White’s aggravated DUI charges required proof that his driver’s license was suspended, *see* A.R.S. § 28-1383(A)(1), while the charge of DUI with a minor present required proving the presence of a child. *See* § 28-1383(A)(3). Similarly, the latter charge does not require proof that the child was actually endangered, while the offense of child abuse requires actual endangerment but not the child’s presence in the defendant’s vehicle during the DUI. *See* A.R.S. § 13-3623(A). The trial court thus correctly found no possible double jeopardy violation because “each of the charged crimes requires proof of elements not included in the others.” *See Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932); *State v. Anderson*, 210 Ariz. 327, ¶ 139, 111 P.3d 369, 399 (2005).

¶5 The trial court addressed White’s claim that his plea had not been knowing and intelligent only in the context of his claim that trial counsel had been ineffective. The court found counsel had not advised White incorrectly about the amount of potential prison time he faced and thus had not been ineffective. We can find nothing in the record to indicate what counsel had told White his sentences might be apart from White’s own statement that he accepted the plea agreement “because he was told that he was facing ten

Here, however, we address it to the extent that his decision to plead guilty might have been affected if, assuming his double jeopardy claim had merit, he should have been facing fewer charges and thus fewer total years in prison if convicted.

years in prison based on the charges against him.” The trial court noted in its minute entry, as White does in his petition for review, that the potential penalty, had White received consecutive sentences on all counts, ranged between 11.5 and 15.5 years.

¶6 We find no merit to White’s claim that his plea agreement was unknowing. If he agreed to plead guilty believing he faced as long as ten years in prison, it seems inconceivable that he would have made a different decision had he known his sentences could be even longer. White’s circumstances are thus entirely different than the defendants’ in *State v. Donald*, 198 Ariz. 406, 10 P.3d 1193 (App. 2000) (defendant claimed he rejected favorable plea offer because counsel failed to explain all of its advantages), and *State v. Bowers*, 192 Ariz. 419, 966 P.2d 1023 (App. 1998) (defendant allegedly induced to plead guilty based on counsel’s overstating risks of proceeding to trial). The record simply does not show that White relied to his detriment on inaccurate information or advice from counsel.

¶7 White’s remaining claims alleged ineffective assistance by trial counsel in failing to challenge an incorrect statement concerning his criminal history that, White claims, unnecessarily prolonged the time he spent in pretrial custody and, second, in possibly having failed to file pretrial motions “on several crucial issues that would have affected any trial that Petitioner might have had.” The trial court found White had failed to establish that counsel’s performance in either instance had fallen below the prevailing professional standard of care and had also failed to establish the second part of the test set out in

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984), by failing to prove that the ultimate outcome of his case would have been different but for counsel's actions. Nothing in the record before us shows the trial court clearly abused its discretion.

¶8 White alleges, as noted, that he was held in custody longer than he should have been because of his counsel's omission at a bond hearing. As a result of the length of his detention, he claims, his impounded vehicle was sold by a towing company as abandoned. These allegations, if true, are indeed unfortunate events, but they are not the sort of harm cognizable or compensable in a Rule 32 proceeding.

¶9 Finding no abuse of the trial court's discretion in dismissing the petition for post-conviction relief, we grant the petition for review but likewise deny relief.

JOHN PELANDER, Chief Judge

CONCURRING:

JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge